

42ND DRAINAGE CONFERENCE
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EASEMENTS IN DRAINAGE

Legal definition of an Easement:

An easement is defined as a right in property which belongs to someone other than the owner and which benefits land owned by the person who has the easement. The property benefitted is described as the dominant tenement and the property which has the burden is described as the servient tenement. There are several types of easements which are found in ordinary day to day practice. A water pipe or telephone line to a house may be protected by way of an easement; a mutual driveway is often protected by easements; an easement for support which the parties on each side of a party wall have against the other. A right-of-way is simply a particular type of easement permitting passage over a particular strip of land.

In law there are four (4) characteristics of an easement:

- a) There must be a dominant and servient tenement.
- b) An easement must accommodate the dominant tenement, however, the properties need not be contiguous;
- c) A person cannot have an easement over their own land;
- d) The right claimed must not be too wide and uncertain.

Easements can be created by:

- a) Statute;
- b) Express grant;
- c) Implication of law;
- d) Under the doctrine of prescription.

We need not deal with the nature of an easement created by express grant (by deed at common law.) Likewise we need not deal here with easements created under the Statute of Prescription.

Section 31 of the *Limitations Act R.S.O. 1990 c. L. s. 15* provides that an easement that is enjoyed for twenty years without interruption or consent by the owner is absolute and indefeasible. ((a) it is important that the owner knew it was being used; (b) that the owner had the right and power to stop its use; and (c) that the owner refrained from doing so.) It must be noted however, that under the *Land Titles Act R.S.O. 1990* it is no longer possible to obtain a prescriptive easement acquired after the establishment of the system. It should be noted that consent under the Planning Act is required for the transfer of an easement.

This paper will focus on easements created by a Statute or by Implication of Law. Dealing first with implication of law: these are easements that arise by law but are not capable of registration. In general they are easements that are necessary for the reasonable enjoyment of the benefitted lands. There are two principal types (a) a right of necessity, e.g. if you own a parcel of land fronting on a highway and you sell off the back half without explicitly giving the purchaser a right-of-way to the highway, the law will normally imply a right-of-way of necessity. (b) a second common implied easement is with respect to right of mutual support e.g. if you own a semi-detached house and your neighbor who owns the half of the house decides to tear it down your neighbor must not do anything that would cause your half to fall. (c) Finally, and of more relevance is a line of cases where an easement is implied, for example, where neighbors agree to dig a well for their common use and enjoyment solely on the land of one, an implied right-of-way will be granted to the owners of the dominant tenements to cross over the land of the servient tenement to access the well. Cases which support this proposition are (*Bruce v. Dixon 1957 O.W.N. 489, also Weeks v. Rogalski (1954 (4) D.L.R. and 439) affirmed in one D.L.R. 2nd edition 709 and Carpenter v. Smith 1951 (2) D.L.R. 609*) The legal issue supported here could be that in the absence of an explicit provision in the Drainage By-Law of a right-of-way for access to a drainage works and/or a working easement, an easement would be implied. In the case of *Phyllis Suhr v. Township of Dover and Chatham*, Referee Clunis in his decision of May 1967 said “The Municipality had a right-of-easement on lands taken for drainage purposes.” Referee Clunis went onto say “I think it is the better opinion that the right acquired by the Municipality in respect of lands taken for drainage purposes should be regarded as an easement.

But whether the Municipality's right be described as an easement or an interest in the land is of little importance here. The law is that a Municipality acquires, when it takes land for the purpose of a municipal drain, the right in perpetuity to enter upon the lands for the purpose of making repairs. In my view it follows that anyone including the owners of the fee who enters upon the channel of the drain may be committing an act to trespass which the courts may restrain." In that decision he quotes Referee Hodgins in the case of *Rhodes v. Township of Raleigh* 1898, 2 C & S. "Though the owners' estate and ownership in the soil of the lands used as the channel of the drain are eo nomine expropriated or vested in the Municipality . . . yet the Municipality on behalf of the owners of the land benefit by the drain acquires a right to enter upon and the use of an easement over such lands . . . substantially equal to taking an expropriation of the lands for the purpose of the drain."

In the decision of the Ontario Drainage Tribunal with respect to the Region of Niagara Sloma Drain in October 1995 in the statement of dicta contained in the Reasons for Judgment stated "the possibility of objections should the land change hands was not sufficient grounds to impose the burden of a right-of-way on the abutting lands. The abutting land owners objected to the provision of a right-of-way. We are of the view that there is an implied easement for that purpose in any event." These decisions have not been appealed or overruled and therefore appear to stand as the current law.

It is my opinion that, if required, a Court could imply a right of easement both for the purpose of access and for the purpose of repair. This implication of law would arise as a benefit to the adjacent land owners in the watershed who are the dominant tenements even though they are not all contiguous with the drain, but who all have an interest in the maintenance and repair of the drain which is essential for the proper use of their property. For this purpose the Municipality might be regarded as the legal agent for the adjacent dominant tenements aside from any statutory provisions. A powerful supporting argument is the obligation imposed on the Municipality under Section 74 of the Act of repair and maintenance of the drain. It clearly assumes the right of access and the right to use an appropriate portion of the adjacent property for

the purpose of conducting repairs and maintenance.

Proctor on Drainage:

The most authoritative text devoted to the law of drainage in the Province of Ontario was written by Frank B. Proctor LLB of Osgoode Hall and published in 1908. Text books do not have the authority of decided cases, but are frequently referred to by the Courts in cases and accordingly have considerable weight in the interpretation of law.

Under the heading Damages, Compensation, etc. on page 160 of Proctor's text he says the following at page 165 with respect to the "extent of ownership acquired by a Municipality."

"In cases where lands have been taken for the purpose of drainage works the courts have differed in opinion as to the extent of ownership necessarily acquired by the Municipality. In Chronic v. Pugh (1881, 136 Ill. 539) the courts described the extent and affect of an appropriation of a private land for the drainage purposes as follows:

'the construction and maintenance of a drain of this character imposed upon the land over which it is constructed perpetual servitude, and it needs no argument to show that besides the interference with the soil and from the construction of the drain, the creation of such servitude necessarily involved various other elements which are equally deserving of compensation. The interest or easement thus acquired imposes upon the servient state not merely the burden of having the soil perpetually

used as a conduit for carrying off the drainage from the dominant estate, but the owner of that estate his heirs and assigns acquire in perpetuity, the right to enter, at all proper seasons for the purpose of making repairs and the servient lands are subject for all times for the burden of receiving the water which will continually be discharged upon it from the drain.’

Proctor goes on to quote Drainage Referee Hodgins in the case of Rhodes v. Township of Raleigh (1898 (2) C& S. 141) previously referred to:

‘Though the owners estate and the ownership in the soil of the lands used as a channel of the drain are not eo nomine expropriated or vested in the Municipality . . . yet the Municipality on behalf of the owner of the land benefitted by the drain acquires a right of entry upon and user of an easement over such lands.’

‘Substantially equal to taking or expropriation of the lands for the purpose of the drain and their value should therefore be estimated and dealt with on the same basic principal of full compensation as for lands taken or expropriated for public purpose under the *Municipal Act.*’

Frank Proctor in the text continues:

“The opinion that a Municipality is authorized to acquire an easement in or a right to use and enter upon, the lands through which the drain is constructed, and to have compensation assessed upon the lands, and is not obliged to acquire and pay for the fee simple of the lands forming the bed of the drain is vigorously supported by MacLennan J. A. in his Judgment in *Prittie v. The City of Toronto* 1892 (19) A.R. 503.”

Proctor continues as follows:

“Various rules have been formulated by the courts for ascertaining the amount that will be allowed in any given case by way of compensation for lands taken or injuriously affected by the construction of drainage works or other public works. It is generally agreed that the land owner should be awarded full compensation both for the land taken and for the injury, if any, sustained by him as to the land which is not taken, necessarily resulting from the appropriation of his land and the construction of the drain.”

Proctor quotes several cases in support of the above statement namely **Rea Richardson and the City of Toronto** (1889 (17) O.R. 491) , **6 v. Action Local Board** (1889 L.r. 14 A.c. 153).

Thus it appears that the common law as defined by various courts decisions interprets the Drainage Act as granting a perpetual easement for the construction of a drain which easement would include the lands necessary on either side of the drain for the construction, the maintenance of the drain and that compensation should be granted not only for the property occupied by the drain itself, but also for the adjacent lands used in the construction and

maintenance and injuriously affected as a result.

Easements created by Statute

The provisions of the Drainage Act provide for a Municipal Council to engage a drainage engineer to prepare a drainage report and after all procedures as outlined in the Drainage Act are completed Section 58 (1) of the Drainage Act provides:

“where the council of the initiating municipality adopted a report for the construction of the drainage works after the time for appeal has expired and there are no appeals or after all appeals have been decided the Council may pass a provisional By-Law thereby authorizing the construction of the drainage works, and work may be commenced ten days after the By-Law is passed (if no notice of intention to make an application to quash the By-Law has been filed with the clerk of the council.)”

Section 29 of the Drainage Act provides that “the engineer in his report shall estimate and allow money to the owner of any land that it is necessary to use for the construction and improvement of the drainage works.” That Section clearly provides for compensation and the use of all land as necessary.

The Drainage Report should define the dimensions of the drain and provide for adequate working areas for construction and repair of the drain. Both the property utilized for the drain itself whether it be an open ditch or tile and the area required to service the same then become the subject of an easement created by statute. The owner of the lands still holds the land in fee simple, but the land is subject to a statutory easement granting certain rights in the exercise of which the Municipality acts as the agent for the surrounding dominant tenements in the water shed, who share in the cost of the construction and maintenance of the drain. The rights established by the easement are limited to the right for the construction and the right of maintenance of the drain in perpetuity. The owner of the land that is subject to the easement is

entitled to have fair compensation for the land taken for the construction and for the land used in the maintenance.

In circumstances where the Drainage By-Law has failed to provide for a working area the best remedy in my opinion would be to rely on Section 78 of the *Drainage Act*.

“Where for the better use, maintenance or repair of any drainage work . . . or to otherwise improve, . . . the council . . . may . . . on the report for an engineer . . . undertake to complete the drainage works . . .”

This procedure would avoid the uncertainty of relying on Court decisions and provide more specific dimensions for the working area at a limited cost in time and money.

Issues to be Considered:

I would like to address several queries that were raised by Sid Van der Veen the Drainage Co-Ordinator with respect to drainage easements when he engaged me to prepare this paper. The first issue raised by him is set out as follows:

“What is the legal right of the Municipality to enter onto land to perform the initial work and also future maintenance? Is it legally an easement?”

In my opinion the *Drainage Act* clearly sets out an elaborate set of procedures whereby a Municipality can by means of By-Law create a Statutory Easement. The By-Law should clearly define the engineering specifications of the drain including the land required for access and maintenance. It is also my opinion that in circumstances where the Report fails to define an area for access and maintenance that the Courts could imply an easement for that purpose.

The second question was as follows:

“Why doesn’t the right need to be registered on title?”

A fundamental principal of Canadian law is that the public is presumed to know the law. A Municipal By-Law properly enacted is a part of the law of the land. If the drainage easement was to be registered in a Land Titles Office and/or Registry Office the *Drainage Act* would have to both require and permit it to be done; but it does not. Any lawyer in searching title in normal circumstances should inquire of the Municipality whether or not there is a municipal drain and if there are financial obligations outstanding with respect to any property to be purchased. Purchasers of rural property would be well advised to exercise caution and seek proper advice with respect to possible drainage schemes located on property to be purchased, because drainage easements are not registered on title.

The third question was as follows:

“In newer reports engineers define a ‘working space’ is that an ‘easement’?”

In my opinion the working space would be part of the statutory easement acquired. However, the area should be specifically defined. Easements require certainty.

The fourth question was as follows:

“Many old reports don’t define a ‘working space’; does that mean there is no ‘easement’? If there is still an easement, what is the reasonable amount land that the Municipality can use?”

It is my opinion, as previously stated, that in the circumstances where the report does not specify a working space that a Court could imply an easement of necessity. Although, I was not able to find a case on point the common law cases in general support the principal of an easement of necessity. It is implied in circumstances where no other reasonable alternative, is available to

carry out the intention or objective of the Parties. Such a principal is supported by the requirement that a Municipality is charged with the responsibility of repairing and maintaining a Municipal drain. Section 74 of our current Act provides for that responsibility. Section 79 of the Drainage Act further states “the Municipality is liable in damages if it fails in the obligation of repair.”

The fifth question is as follows:

“If there is a municipal easement along a drain can the Municipality use it for anything else other than drainage?”

It is my opinion that a drainage easement whether created by statute or by implication of law could not be utilized for any other purpose than drainage.

The sixth question is as follows:

“What takes precedent if a Municipal Drain right-of-way intersects with a road right-of-way or a Hydro One right-of-way?”

With respect to a Hydro One easement it would have the same status as a municipal drainage easement. If one crosses the other each would have to accommodate the interest of the other easement. With respect to a road way the issue is different because the road way is not an easement, but rather ownership is with the Crown. In my opinion the municipal drainage easement would not have precedent over the Crown lands and legal accommodations would have to be reached.

Conclusion:

Frank Proctor in his introduction of the classic text stated that in the interpretation of the Drainage Act the Courts should afford “a liberal interpretation” and he quotes a decision of Mr.

Justice Meredith in Dundas Street Bridges (1904, 80LR, 52 in support:

“It is always to be born in mind that these local improvement clauses are to be considered remedial legislation and are to receive such large and liberal construction as will best obtain the objection of the enactment. They are to be worked out by that plain class of layman, which usually fills municipal office of Township, Town or Village as well as of the City.”

Proctor goes on to quote the late Chief Justice Haggerty in the Decision of Huson v. The Township of North Norwich 1892, 19 A.R. at 343.

“The Courts from the earliest date have striven to avoid undue strictness in the insistence of exact performance of statutable formalities, where they could see that the objection did not reach either to a clear omission of some condition precedent required to perform; where a mistake has been made in perfect good faith and with honest purpose of obeying the law although unintentionally deviating from the strict formal observance.”

Thus it could be said that the higher Courts have consistently found the Drainage Act to be remedial legislation and that it should receive a broad liberal interpretation avoiding the restrictions of a narrow technical interpretation.

It should be noted that the 1975 Act attempted to remove local politics as a determining factor in Municipal Drainage by transferring the burden of interpreting the sufficiency of a Petition from a Municipal Council to a professional drainage engineer. In doing so it also revised the critical

wording to be considered in determining the sufficiency of a Petition by introducing the wording “ area requiring drainage” (all of which might be owned by one owner whose signature alone would suffice on a Petition) as opposed to previous wording which required a majority of owners of lands to be benefitted in the area as described in the Petition. It is obvious that a “majority of owners benefitting” was much broader and therefore likely encompassed a much greater number of owners. The new Act ensures that the process is not a democratic process, but a process which gives relief if necessary to a downstream owner or owners, who is or are not required to depend on the goodwill of their upstream neighbors for a remedy.

The remarkable wisdom and practicality of the current Drainage Act is illustrated best by the paucity of current Court decisions dealing with its interpretation. As you can observe from this paper most of the Court decisions are of ancient vintage and rarely are decisions relating to the Drainage Act appealed. In my many years of making decisions both as Chairman of the Drainage Tribunal and as the Ontario Drainage Referee I can recall only three appeals to the Ontario Divisional Court, two of which decisions were affirmed.

Thank you for your attention and your courtesy.